INDIAN WOMEN AND THE LAW IN CANADA:

CITIZENS MINUS

by

Kathleen Jamieson

SUMMARY

April 1978.

Canadian Advisory Council on the Status of Women
Box 1541 Station B, Ottawa K1P 5R5

Conseil consultatif canadien de la situation de la femme
C.P. 1541 Succ. B, Ottawa K1P 5R5

INDIAN WOMEN AND THE LAW IN CANADA: CITIZENS MINUS

by Kathleen Jamieson

SUMMARY

For one hundred and nine years Indian women in Canada have been subject to a law which discriminates against them on the grounds of race, sex and marital status. The Indian Act, which regulates the position of Indians in Canada, provides that an Indian woman who marries a non-Indian man ceases to be an Indian within the meaning of any statute or law in Canada.

"The consequences for the Indian woman of the application of Section 12(1)(b) of the Indian Act extend from marriage to the grave -- and even beyond that." The woman on marriage must leave her parents' home and her reserve. She may not own property on the reserve and must dispose of any property she does hold. She may be prevented from inheriting property left to her by her parents. She cannot take any further part in band business. Her children are not recognized as Indian and are therefore denied access to cultural and social amenities of the Indian community. And, most punitive of all, she may be prevented from returning to live with her family on the reserve, even if she is in dire need, very ill, a widow, divorced or separated. Finally, her body may not be buried on the reserve with those of her forebears.

No such restrictions are provided in the Indian Act for Indian men, who may marry whom they please without penalty and indeed by doing so confer on their non-Indian spouses and children full Indian rights and status.

Two widely held misconceptions about this discriminatory section of the Indian Act are that it reflects Indian cultural tradition and that it was designed to protect Indian lands against encroachment from white men who might marry Indian women.

The 1869 legislation, which first introduced the section penalizing women who "marry out", was created primarily on the basis of the Dominion Government's experience with the Iroquois and Algonquian groups of Ontario and Quebec. In these societies, women did much of the work and were the traditional providers for their families. Among the Iroquois, descent was traced through women and after marriage the husband went to live with his wife's family.

European cultural values served as a model for the development of the early laws relating to Indians and historical documents show that from the beginning Indians were strongly opposed to legal discrimination against Indian women who married non-Indians and their children.

Indians have never been a party to formulating any section of the Indian Act -- they were not consulted in 1869, nor have they ever, until now, been concerned in the drafting of legislation for Indians. Indeed, the whole of nineteenth century legislation for Indians was based on the assumption that Indians were to be gradually "civilized", to be assimilated by the superior culture, and that in the meantime special laws were required to regulate their transition from barbarism to this state of grace. The culmination of this process was the act of enfranchising, which meant that an Indian was no longer an Indian in law, had become civilized and was entitled to all the rights and responsibilities of other Canadian citizens. The best efforts of the Indian Department were directed toward this end.

Various commissions of inquiry were established during the nineteenth century and the first half of the twentieth century to review progress in the process of assimilation and to adapt and change the legislation to bring this about. After the Second World War, a special Joint Committee of the Senate and the House of Commons was established and its deliberations led to the enact

ment of the Indian Act of 1951, which is the Act in force today. The restrictions placed on Indian women who married out were even more severe in this Act than they had been in previous legislation.

Concern for human rights in the later part of the fifties led to the passage of the Canadian Bill of Rights in 1960, and in the same year the extension of the franchise to the Indians, marking the beginning of a new political awareness for and of Indians. It then began to appear that Indians were moving to a position where they had more rights than other citizens and where they were, in fact, "citizens plus...as charter members of the Canadian community", as a 1967 report from the Department of Indian Affairs described it.

The development of native militancy in the late sixties and early seventies culminated in the Lavell case, and the events surrounding this case are crucial to understanding the complex approach of status Indians to Indian women's rights today.

The stand taken by Jeannette Lavell was itself, first of all, a manifestation of the resurgence of pride in Indian identity. It was an affirmation by an Indian woman of belief in the concept of "citizen plus" and the desirability of retaining Indian status. To pose this case, as it has been, as one of Indians' rights vs. women's rights, is to assume that all Indians are male.

The case,which became a political vehicle for both the government and the Indians, came before the Supreme Court of Canada in 1973, when Jeannette Lavell contested her loss of status under Section 12(1)(b) of the Indian Act. The basis of the case was that the discriminatory provisions of this section were contrary to the Canadian Bill of Rights.

The government had just published a "White Paper" proposing that the Indian Act should be phased out. But a strong Indian political front was emerging, apparently determined to wring from

the government redress for past injustices. Insistence on the retention of the Indian Act was regarded as a crucial part of this strategy by the Indian leaders. As Harold Cardinal put it, "We do not want the Indian Act retained because it is a good piece of legislation, it isn't. It is discriminatory from start to finish. But it is a lever in our hands and an embarrassment to the government, as it should be....We would rather continue to live in bondage under the inequitable Indian Act than surrender our sacred rights."

The Indian Act was thus transformed from the legal instrument of oppression which it had been since its inception into a repositor of sacred rights for Indians. The opposition of Indian leaders to the claim of Lavell became a matter of policy to be pursued at all cost by government and Indians together because it endangered the Indian Act.

Jeannette Lavell lost her case, but the consequences were far-reaching. The issue of Indian women's status under Section 12(1)(b) acquired, for many people, the dimensions of a moral dilemma -- the rights of all Indians against the rights of a minority of Indians, i.e. Indian women. The case created a united Indian front on the "untouchable" nature of the Indian Act and the government gave an undertaking to the National Indian Brotherhood that no part of the Indian Act would be changed until revision of the whole Act is complete, after full process of consultation. The result of this gentlemen's agreement has been that until very recently a powerful blanket of silence was imposed on discussion of the status of Indian women and it became taboo to even mention the subject. During the course of research for the present study, officials of the Department of Indian Affairs frequently expressed the view to the author that even to research the issue was liable to upset the delicately balanced negotiations between the government and the NIB. Thus it seems that the rationale used by Cardinal which justified the victimization of Indian women has become conventional wisdom.

Many parliamentarians are beginning to find the legislation on Indian women an embarrassing anachronism, especially since loss of status is now clearly seen as a violation of fundamental human rights. But while both sides admit that the discrimination against Indian women is manifestly unjust, neither the government nor the Indian leaders have yet been able to agree on how this question might be resolved.

Since the articulation of the special status concept "citizens plus", Indian leaders have continued to insist that Section 12(1)(b) must not be repealed, however unjust it is. They claim that the Indian Act, which symbolizes their special status, will thus be laid open to government attempts to encroach on this special status.

The government, on the other hand, apparently believes that it can escape the consequences of confronting the issue by laying the whole blame for the continuing discrimination on the NIB, by arguing that it has promised the NIB not to make any changes to the Indian Act until the whole Act is revised through the joint NIB-government committee, and that any interim attempts to alleviate the women's situation would be interpreted as bad faith.

The NIB has refused to allow status or non-status native women's organizations to be represented in these negotiations. Curiously the federal government does not see anything at all amiss with the fact that the NIB can unilaterally make such a decision. As "Indians" meant only males to the governments in the past, so it is today.

This denial of the human rights of Indian women on the part of both the government and the NIB has been compounded by the fact that this same government has carefully excluded any possible recourse in law by removing the Indian Act from the reach of the new Human Rights Act, which came into force on March 1, 1978.

Indian women have nowhere to turn and are denied the basic human rights enjoyed by other Canadians.

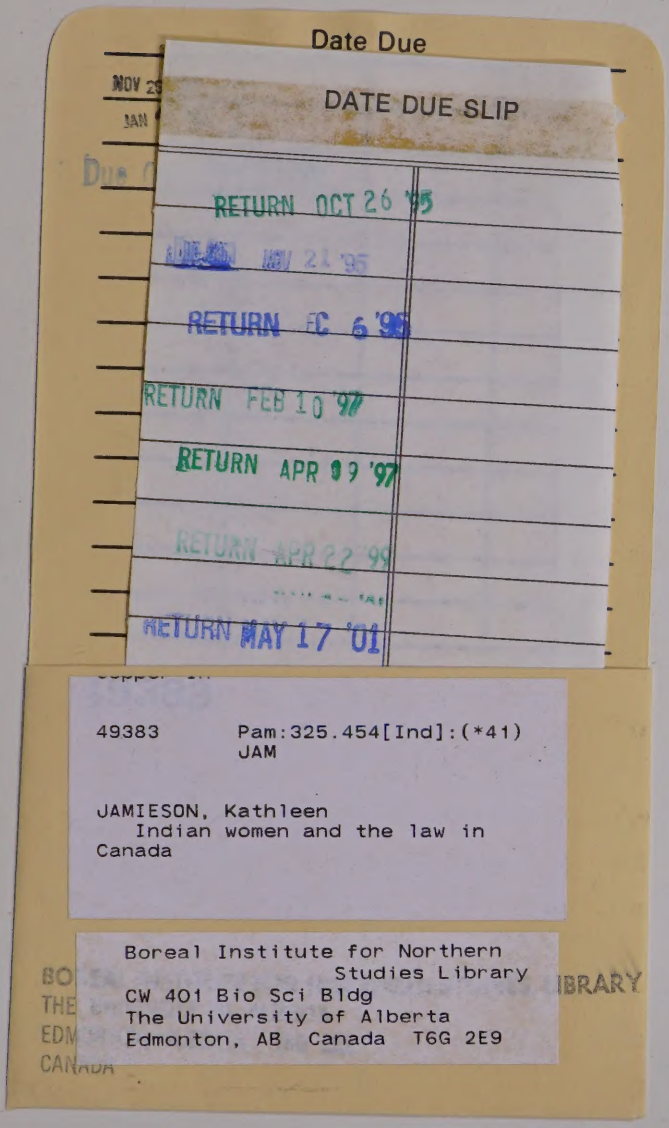
Indian Rights for Indian Women is at present considering options for a definition of membership which would replace the present discriminatory sections of the Indian Act. As an interim measure, they have made three minimal requests to government to alleviate the situation in which Indian women now find themselves.

They have asked that evictions of Indian women and children from reserves be stopped immediately. Those who are being evicted are elderly women, widows and deserted mothers with small children. Their request, however, has been rejected.

IRIW have asked that since both government and Indian leaders have said that Section 12(1)(b) is unjust and discriminatory the implementation of this section be suspended until the whole Act is revised. This request has also been denied.

They have asked that, since it is their fate that is being decided and Indian women are at least half of the Indian population, Indian women's organizations be allowed an official voice in the joint NIB-government negotiations on the revision of the Indian Act. This request has also been refused.

One thing is clear -- that to be born poor, an Indian and a female is to be a member of the most disadvantaged minority in Canada today, a citizen minus. It is to be victimized and utterly powerless and to be, by government decree, without legal recourse of any kind.


Date Due
DATE DUE SLIP
RETURN OCT 26 '95
RETURN FEB 10 '97
RETURN APR 09 '97
RETURN MAY 17 '01
49383 Pam:325.454[Ind]:(*41)
JAM
JAMIESON, Kathleen
Indian women and the law in
Canada
Boreal Institute for Northern
Studies Library
CW 401 Bio Sci Bldg
The University of Alberta
Edmonton, AB Canada T6G 2E9